

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER CURTIS PAGE,

Defendant-Appellant.

UNPUBLISHED

April 28, 2005

No. 251629

Roscommon Circuit Court

LC No. 02-004328-FC

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct involving a person less than 13 years of age, MCL 750.520b(1)(a). He was sentenced to 15 to 30 years' imprisonment and appeals as of right. We affirm.

Defendant's conviction arises out of the digital penetration of the victim, his step granddaughter. The victim, seventeen years of age at the time of trial, alleged that, years earlier, defendant would take her for driving lessons, during which he would sexually assault her. The victim testified that she received special attention and gifts from defendant that his other step grandchildren did not receive. The abuse stopped at the age of twelve, when the victim spent less time at her grandmother's home. The victim testified that she reported the abuse to a counselor after engaging in self-mutilation activity and after being placed in a psychiatric hospital. The victim had recently learned that she would have a niece and feared that the cycle of abuse would continue, causing her to report the abuse.

On the contrary, defendant and his ex-wife, the victim's grandmother, portrayed the victim as a selfish, manipulative child who would lie to obtain what she wanted. They testified that defendant had promised to purchase the victim a car. However, after she was told that she would not receive a car, the report of abuse, that purportedly had occurred years earlier, was raised. They testified that defendant had been impotent for seven years.

Defendant first alleges that the lack of specificity of time and information deprived him of his constitutional rights. We disagree. Defendant did not object to or move to have the information amended, therefore, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). The information need only state "the time of the offense as near as may be." MCL 767.45. An indictment may not be quashed, set aside, or dismissed on the basis of uncertainty; rather, the court may order amendment to cure

any defect. See MCL 767.75; MCL 767.76. To determine the extent of the specificity required, the following factors are examined: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense. *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986). When the prosecutor has stated the date and the time of the offense to the best of his knowledge following a thorough investigation, the factors weigh against concluding that a deficiency is presented. *Id.* at 234. Time is generally not of the essence or a material element in a criminal sexual conduct case where the victim is a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987).

The victim testified that the abuse began at an early age and recalled two specific incidents, a driving lesson and a trip to the hospital, wherein sexual abuse occurred, during a two-year period of time. The victim was a child at the time of the abuse, and time is not of the essence when a child is involved. *Stricklin, supra*. Following review of the record, we cannot conclude that defendant has established plain error affecting substantial rights. *Carines, supra*.¹

Defendant next alleges the trial court erred by admitting other acts evidence and expert testimony. We disagree. We review the trial court's admission of evidence for an abuse of discretion, and a decision on a close evidentiary question cannot be an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A high degree of similarity between the other acts and charged acts should not be imposed by the appellate courts. *Id.* at 252. "For other acts evidence to be admissible there must be a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Id.* at 251. The uncharged acts evidence need only support the inference that the defendant employed the common plan in committing the charged offense. *Id.* at 253. Based on this standard, we cannot conclude that the trial court abused its discretion by admitting the other acts evidence. The other acts testimony need not mirror the testimony of the charged act and supported the inference that defendant employed the same plan with his other step grandchildren. Moreover, there was no abuse of discretion by admitting the expert testimony wherein the criteria for admission was satisfied. See *People v Peebles*, 216 Mich App 661, 667-668; 550 NW2d 589 (1996); MRE 702.²

¹ On appeal, defendant asserted that requiring a specific date was necessary to develop an alibi defense. However, the *Naugle* Court rejected a request to require a specific date, stating: "A defendant would simply have to make the assertion of alibi in order to escape prosecution once it became apparent that a child was confused with respect to the date of a sexual assault." *Naugle, supra* at 234. Defendant further alleges that the "delay" caused him prejudice because he was unable to assert an alibi defense. See *People v Loyer*, 169 Mich App 105, 118-119; 425 NW2d 714 (1988). Defendant failed to meet his burden of establishing prejudice, see *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). Defendant cannot meet his burden in demonstrating prejudice in light of the law addressing specificity involving children and criminal sexual conduct cases.

² Within the discussion of this issue, defendant also alleges that the trial court erred in failing to grant an adjournment of trial. The trial court's decision to grant a continuance or adjournment is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665

(continued...)

Defendant next alleges that he was denied a fair trial based on prosecutorial misconduct. We disagree. A claim of prosecutorial misconduct is a constitutional issue reviewed de novo by this Court. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of prosecutorial misconduct, however, are reviewed by this Court for plain error. *Carines, supra*. No error occurred if a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). We review the prosecutor's conduct on a case by case basis, examining the record and evaluating remarks in context and in light of the defense arguments, to determine whether the defendant was deprived of a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). A prosecutor may argue the evidence and all reasonable inferences arising there from as it relates to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant's contention that the prosecutor committed misconduct by admitting other acts evidence is without merit. A pretrial motion was filed to address the admissibility of other acts evidence, and the trial court granted the motion. Thus, this claimed error is without merit. Also, there is no record evidence that the prosecutor excluded key portions of a plea bargain agreement with defendant's former cellmate. Before trial, defendant filed a motion to disqualify the county prosecutor's office based on its negotiation of a plea bargain. At that time, the prosecutor delineated the understanding of the agreement and noted that it had not been reduced to a writing. There is no evidence in the record that portions of the plea bargain were excluded. Moreover, defense counsel examined the witness regarding the credibility of his testimony in light of his plea agreement. Finally, the prosecutor utilized the expert to explain why a delay in reporting may occur with child victims and why a child may participate in the activity. This testimony assisted the trier of fact, MRE 702, and therefore, this issue is without merit.

Defendant next challenges his sentence, alleging that it was based on improper scoring, used an incorrect burden of proof, and was disproportionate.³ We disagree. Defendant waived review of the challenges to the scoring and proportionality of his sentence by failing to provide a copy of the presentence investigation report (PSIR). *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Defendant contends that he was subjected to an improper burden of proof with regard to the scoring. However, we are unable to review this contention in light of the failure to attach the PSIR, and our Supreme Court has rejected the issue posed by defendant. See *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant next alleges that trial counsel was ineffective. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance

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(2002). Based on this record, we cannot conclude that an abuse of discretion occurred. Newly retained counsel had ample time to prepare the case, and the record reflects that counsel was prepared for trial, but trial strategy was unsuccessful.

³ Because the offense was committed before January 1, 1999, the judicial sentencing guidelines apply. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Decisions addressing the evidence to be presented and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not substitute our judgment for that of trial counsel when addressing issues of trial strategy, nor will we view counsel's competence with the benefit of hindsight. *Id.* at 76-77. A testimonial record from trial counsel is essential to support a claim of ineffective assistance of counsel. *Id.* at 77. When a testimonial record is not presented, our review is limited to mistakes apparent on the existing record. *Id.*

Based on the review of the existing record, defendant has failed to meet his burden of demonstrating ineffective assistance of counsel. *Effinger, supra.* On February 5, 2003, defendant's trial was scheduled to commence. Defense counsel did not indicate a need for an adjournment to prepare for trial. Rather, defense counsel noted that a key witness, defendant's ex-wife and the victim's grandmother, was hospitalized and unavailable to testify at that time. The trial court granted the adjournment with defendant agreeing to waive his speedy trial rights. However, on February 7, 2003, defendant retained new counsel, who moved to adjourn the trial, citing the need to prepare. On March 6, 2003, the trial court denied the motion, noting that a new attorney could not rely on adjournment of a case previously scheduled for trial. More importantly, the record does not reflect that trial counsel was ill prepared. Rather, the record indicates that the strategy employed by defense counsel was unsuccessful, and we do not review trial strategy with the benefit of hindsight. *Rockey, supra.* The record reveals that trial counsel did not attack the nuances of the victim's recollection and the expert testimony because the defense theory of the case was that the abuse never occurred. Furthermore, the defense offered testimony that the report of abuse was the result of the victim's anger when advised that she would not receive a car as promised. Accordingly, this claim of error is without merit.⁴

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio

⁴ Because the PSIR has not been provided, we cannot address the challenge to the effectiveness of trial counsel at sentencing.